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Fighting for Authority: Strategic Actions of National High Courts in the European Union

Abstract
National high courts in the European Union (EU) are constantly challenged: the European Court of Justice (ECJ) claims the authority to declare national standing interpretations invalid should it find them incompatible with its views on EU law. This principle noticeably impairs the formerly undisputed sovereignty of national high courts. In addition, preliminary references empower lower courts to question interpretations established by their national 'superiors'. Assuming that courts want to protect their own interests, the article presumes that national high courts develop strategies to elude the breach of their standing interpretations. Building on principal-agent theory, the article proposes that national high courts can use the level of (im-) precision in the wording of the ECJ's judgements to continue applying their own interpretations. The article develops theoretical strategies for national high courts in their struggle for authority.

Key Words: European Court of Justice, High National Courts, Judicial Actors, Principal-Agent Theory, Strategic Action

Zusammenfassung
Ein Kampf um Autorität: Strategisches Handeln oberster nationaler Gerichte in der Europäischen Union
Im europäischen Mehrebenensystem werden oberste nationale Gerichte ständig herausgefordert: Der Europäische Gerichtshof beansprucht die Autorität, die Rechtsauslegungen der obersten Gerichte für unanwendbar zu erklären, sollte er sie für nicht vereinbar mit europäischem Recht halten. Dieser Grundsatz beschneidet die zuvor unbestrittene Auslegungshoheit der nationalen obersten Gerichte deutlich. Darüber hinaus gibt das Vorabentscheidungsverfahren nachgeordneten Gerichten die Möglichkeit, die Interpretationen ihrer „Vorgesetzten" infrage zu stellen. Unter der Voraussetzung, dass Gerichte ihre eigenen Interessen verteidigen wollen, wird erwartet, dass oberste Gerichte Strategien entwickeln, um ihre Auslegungshoheit zu bewahren. Auf der Grundlage einer Prinzipal-Agenten-Beziehung wird angenommen, dass oberste Gerichte ungenaue Formulierungen in den Urteilen des Europäischen Gerichtshofes nutzen, um ihre eigene Auslegungspraxis weiterführen zu können. Der Artikel stellt Strategien vor, die oberste Gerichte in ihrem Kampf um Autorität nutzen können.

Schlagwörter: Europäischer Gerichtshof, judikative Akteure, oberste nationale Gerichte, Prinzipal-Agenten-Theorie, strategisches Handeln

1 National High Courts in the European Multi-Level System

Courts – especially high and constitutional courts – undisputedly play a central part in policy development and execution: be it through their interpretation of single regulations, vetoing a standing interpretation, by even practically creating a new norm, or by drawing

parliament's attention to a necessary re-evaluation (Gibson, Lodge & Woodson, 2014, p. 839; for a collection of case studies see Volcansek, 2014). Taking into account the strict hierarchy of national judicial systems, high courts also impose their interpretation of the law on lower, meaning 'subordinate', courts. Therefore, high courts can arguably be the most influential actors in the interpretation and even the development of national law.

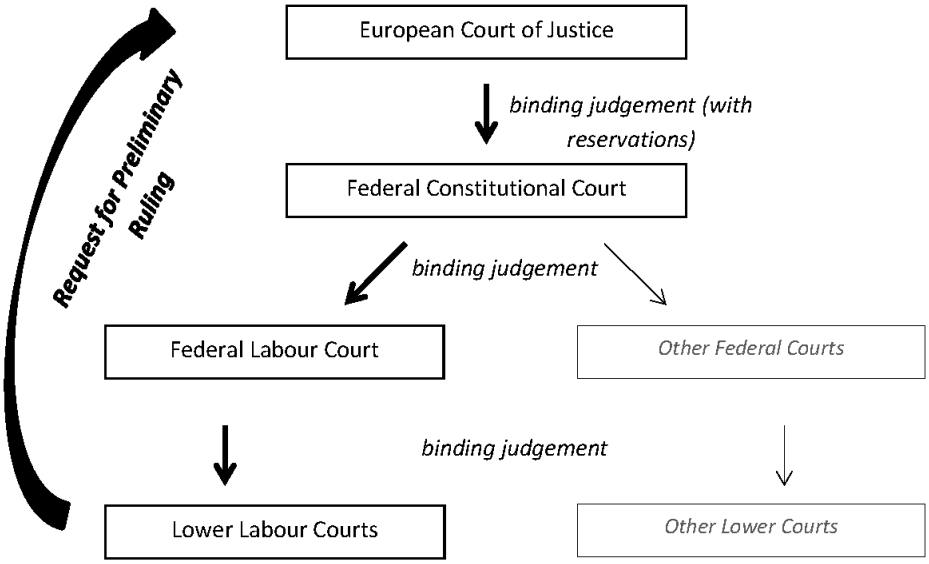
However, when adding the judicial system of the European Union (EU) to the picture, this assessment must be called into question. During the process of European integration, the European Court of Justice (ECJ) was able to shape EU law and its own role in the continuously developing Union (see e.g. Burley & Mattli, 1993; Alter, 2001; Conway, 2012; Kelemen & Schmidt, 2012). The most important steps in this process were the establishment of EU law as a 'new legal order', which produces 'direct effect' without having to be transferred into national law, and the declaration of EU law's supremacy of application, which can effectively supersede the member states' national legislation (see e.g. Mayoral, 2017, p. 552). The ECJ's interpretation of EU law is therefore in most parts binding for the member states and significantly influences the development and interpretation of national law.

The consequences of direct effect and EU law supremacy are especially far-reaching for national high courts (Alter, 2001): the virtually binding effect of the ECJ's judgements contests their formerly mostly unchallenged authority and can cause them to deviate from their established practices should their standing interpretations contradict the ECJ's views on EU law. Thereby, national high courts have to accept that they lose their spot at the 'top of the food chain' in all matters concerning EU law should they acknowledge the ECJ's general role in the EU's legal system (Höreth, 2008; Ketelhut, 2010). In addition, Art. 267 of the Treaty on the Functioning of the European Union (TFEU) allows lower courts to request a preliminary ruling by the ECJ if they are uncertain how to interpret EU law in a pending case. Thus, lower courts may cast into question a high court's standing interpretation, expressing their doubts on the compatibility of their 'superior's' principles with higher ranking law (see *Figure 1*). Should the ECJ find a national norm or at least its present application to be inconsistent with EU law, the said national application will have to be adjusted. This way, high courts will have to change their established practices following an initiative of a lower court, which is supposedly bound completely to the interpretations of its federal 'superior' (Thüsing, 2009).

It becomes evident that high courts are continuously losing authority when interpreting the law: they have to acknowledge a higher level of jurisdiction as well as come to terms with the possibility of lower courts not following their lines of interpretation and even indirectly compelling them to change their practices. On the whole, a shift of power in the European judicial system in favour of the supra- and subnational level and with the high courts as 'losers' in the process is apparent (Alter, 1996; Mattli & Slaughter, 1998; Stone Sweet & Brunell, 1998; Hix & Høyland, 2011; Hornuf & Voigt, 2012). It seems far-fetched to assume that high courts will gladly embrace this development. In fact, it is rather to be expected that they will try to find ways to preserve their authority as best they can (Alter, 1996; Ketelhut, 2010). Following Alter, 'authority' here means, "that judges protect their legal turf" (Alter, 2001, p. 46). Using a principle-agent approach, this article sets out to infer strategies for high courts to defy assaults on their standing interpretations and jurisdiction. It thereby widens the theoretical view on judicial actions which has for a long time been mostly restricted to analysing courts' strategies to develop and assert policy preferences (Epstein & Knight,

2013). As illustrations of inferred strategies, the article draws on judgements by the German Federal Labour Court (*Bundesarbeitsgericht*).

Figure 1: Judicial Hierarchies within the European Union



Source: Own illustration.

2 Principal-Agent Relationships in Judicial Systems

Following its original definition stemming from economics, a principal-agent relationship can be described as any situation, in which "one, designated as the agent, acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems" (Ross, 1973, p. 134) in a form of a "contractual relationship" (Waterman & Meier, 1998, p. 174). In an ideal case, the agent is supposed to realise its principal's preferences true to the letter and to their full extent. However, this ideal cannot be reconciled with the dogma of an inherent self-interest of every organisation (Songer, Segal & Cameron, 1994). Instead, 'shirking' – meaning the agent's tendency to pursue its own preferences instead of shaping its behaviour according to the principal's preferences (Waterman & Meier, 1998) – becomes likely. The extent of an agent's shirking depends on several factors, such as the differences of the principal's and its agent's preferences.

A principal will always try to avoid its agent's shirking. However, shirking may under most circumstances hardly be preventable completely: to ensure the implementation of their preferences, principals would have to constantly control their agents' behaviour, confronting the principal with considerable costs for identifying and monitoring the agents' actions (Pollack, 1997; Waterman & Meier, 1998; Hawkins, Lake, Nielson & Tierney, 2008). Therefore, the principal will analyse its ability to control the agent and the possible benefits a restriction of its control would entail and consequently make a (as far as possible) rational decision about its amount of control over the agent.

As shown by, e.g., Donald R. Songer, Jeffrey A. Segal and Charles M. Cameron (1994) and later by Clifford J. Carrubba and Tom S. Clark (2012), this construct can without difficulty be transferred to a national judicial system: in a perfect judicial hierarchy, lower courts are mainly responsible for interpreting and developing the law, while supreme courts act as 'overseers' who can determine the amount of 'leeway' lower courts have for their actions independent of their agents' preferences, which might deviate from their own.

For the purpose of this article, national courts shall be seen as the ECJ's agents. The fundamental criterion of a contractual relationship between principal and agents can be confirmed: Art. 19 of the Treaty on the European Union (TEU) determines the ECJ to be responsible for interpreting EU law, while "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". "Sufficient remedies" must be interpreted to include national courts' obligation to identify and judge breaches of EU law by national authorities. In this respect, national courts act "on behalf of, or as representative of" the ECJ, enforcing its interpretation by applying it in subsequent rulings. National courts can therefore be seen as the ECJ's agents.

To determine whether shirking occurs, principal and agents must be found to have their own interests which deviate from each other. It has already been acknowledged that courts can behave like strategic – and self-interested – actors in extant research (see e.g. Alter, 2001). In this context, the ECJ is often seen as a driver of European integration (Burley & Mattli, 1993; Stone Sweet & Sandholtz, 1997; Stone Sweet & Caporaso, 1998; Greer, 2006; Blauberger, 2014).

From the mid-1990s onwards, lower courts have been added to these observations. It is assumed that lower courts can use preliminary references to the ECJ to shift authority away from national high courts towards themselves, strengthening their power to challenge standing interpretations developed by high courts (see e.g. Alter, 1996; Mattli & Slaughter, 1998; Stone Sweet & Brunell, 1998; Hornuf & Voigt, 2012). High national courts, correspondingly, were confronted with an undermining of their dominant position and prerogative of interpretation in the national legal hierarchy. Instead, they would have to accept an authority that can contravene its standing principles which they have developed over a long time and which are engrained in the national legal practice. As such, "higher courts had the most to lose" (Alter, 1996, p. 464) in the course of European legal integration.

In extant research, the actions of high courts have been comparatively neglected. This does not imply that the thought of member states' high courts acting strategically has not been voiced (Ketelhut, 2010), but their opposition to the ECJ has been largely dismissed as being unlikely, unsuccessful and/or irrational (see e.g. Alter, 1998) due to the severity of its consequences. This conclusion has to be updated and differentiated as there are in fact cases where national courts openly deviated from the ECJ's interpretation. These 'obvious' cases, however, are mostly the prerogative of constitutional courts (see e.g. the *Solange*-judgements by the German Federal Constitutional Court). The general statement on the low likelihood of open deviation of high courts holds water. On a more theoretical level, extant research does not take into account that high courts might find ways to keep their opposition hidden or protected through legitimate loop-holes in the ECJ's judgements, instigating them to find ways of 'shirking'. This possibility is explored in the following paragraphs.

As mentioned above, the principal will try to avoid an agent's shirking and can do so by closely monitoring the agent's actions. Considering that more than 600 cases are referred to the ECJ each year, including more than 400 references for preliminary rulings (European Court of Justice, 2/17/2017), and the decisions of all courts in all member states are seemingly without number, it becomes evident that a truly effective control of the implementation of the ECJ's judgements by national courts 'true to the letter' is hardly feasible. It would require a close analysis of every national judgement applying EU law. Alternatively, the ECJ should try to forestall its agents' shirking by wording its judgements as clearly as possible. Under these circumstances, a violation of the ECJ's principles by a national court would be rather conspicuous and easy to spot without such a close analysis, thereby reducing the effort needed for detecting an agent's shirking. Therefore, "the language component is vitally important: it sets the limits of interpretation [of the ECJ's judgements by the national courts]" (Bendor & Segal, 2011, p. 470).

Still, the ECJ might have several reasons to trade off this benefit of preciseness and rather resort to "fuzzy language" (Šadl, 2013, p. 212). Jeffrey K. Staton and Georg Vanberg list several aspects of the 'Value of Vagueness' (2008). Internal influences on a judgement's precision might be, among others, conflicts between the judges in which case a certain level of imprecision can help to avoid decision costs in the form of a prolongation of the decision-making process. Vagueness – or at least the absence of explicitly mentioned rules of interpretation – could also be used to avoid "a type of judicial accountability" (Conway, 2012, p. 26) in difficult cases. Externally, vagueness might be a result of uncertainties about the consequences of a definite decision which might even entail recommended actions; Staton and Vanberg (2008) call this the "means-ends" problem and describe a court's aim as not to risk error costs by avoiding to come to suboptimal or non-intentional results.

Furthermore, although a vague judgement diminishes the ECJ's ability to control its agents, it might find that, in favour of avoiding open conflict, it should accept the risk of a certain amount of 'hidden' shirking (Lax, 2011). Clifford J. Carrubba, Matthew Gabel and Charles Hankla argue that member states can use the threat of a 'legislative override' to ex ante influence the ECJ's judgement (Carrubba, Gabel & Hankla, 2008; Blauberger & Schmidt, 2017). In these cases, the ECJ will anticipate the member states' reaction to its decisions and can shape its judgements according to their preferences to secure their open support (Alter, 2014). Such an open support – or at least the avoidance of criticism – could also be important in the ECJ's relationship with national courts. Therefore, the ECJ will have to consider its desire to control its agents as well as the costs and risks of too precise a judgement when putting its interpretation into words and contravening the agents' preferences. However, the more vague its decision is, the easier it will be for national courts to remain undetected when interpreting the ECJ's ruling freely and according to their own preferences.

Just as the ECJ, high courts will have to calculate costs and benefits when deciding on their reaction to a breach of their standing interpretations. Analogous to models of member states' behaviour when implementing EU directives, high courts shall be seen as rational actors led by the prospect of sanctions and incentives having to weigh their pros and cons (Tallberg, 2002). As illustrated above, the main incentive for high courts when deciding on their reaction is the level to which they will be able to continue applying their standing interpretation in the national context – effectively defying the ECJ.

At the same time, it can be assumed that they will try to minimise the risk of being found out by both the ECJ and other actors such as 'their' lower courts. Although the ECJ itself might not have substantial means to directly sanction national courts, it might try to retroactively diminish a high court's opportunities to shirk by re-defining and narrowing the interpretation in question. Whereas this would not directly affect a high court's prior judgements, it will restrict its margin for independence in subsequent cases and possibly cast its prior action into doubt. By avoiding the detection of their shirking, national high courts can hope to retain their authority for as long as possible.

The most important actors a high court might fear are lower courts as its 'subordinates'. Should lower courts have to decide a case on which ECJ and 'their' high court obviously stand for different ways of interpreting the law, they would have to choose which 'superior' to follow and they might well elect to follow the ECJ's decision. In this case, a high court would have opted to fight for its authority without being able to retain its hold on lower courts against the ECJ as 'competitor' (Dani, 2017, p. 194). However, high courts should minimise the risk of losing control over lower courts by avoiding an open and obvious conflict between their judgements and the ECJ's interpretations. This will be easier if the ECJ's judgement itself leaves room for interpretation. It is therefore assumed that high courts will determine their potential for shirking by analysing the (im-)precision of the ECJ's wording in a given judgement. Should the wording be imprecise, the high courts should see a greater potential for shirking. On the other hand, the high courts' potential for shirking should be inhibited by the precision of the wording of a judgement. The following paragraph will introduce possible strategies for high courts before illustrating these strategies with practical examples.

3 Strategies for National High Courts

The possibilities for strategic actions of high courts must be seen as a continuous spectrum with a theoretically infinite number of alternatives. The nuances in the ECJ's wording entail just as many options. On the one end of this continuous spectrum stands a complete acceptance and implementation of the ECJ's judgements by high courts irrespective of a possible conflict with their standing principles of interpretation. This alternative would be in line with the ECJ's doctrine of direct effect of EU law and its structurally strict hierarchy of the European judicial system. Such a complete acceptance by high courts might be explained by different scenarios: first, the ECJ might antedate a decision that the high court would have made as well in the near future. In such a situation, the high court would have no reason to look for shirking opportunities as the ECJ's decision would be identical to the high court's own preferences. This could be the case if both courts feel the need to react to social or legal developments that necessitate the adjustment of standing interpretation. This action shall be termed *voluntary compliance* (see *Table 1*). However, the scenario of noticeable legal and social change that is perceived by both the national and the supranational level is hard to determine. It might be applicable in highly dynamic legal contexts, but seems rather unlikely in fields being characterised by long-standing practices.

Furthermore, it has to be acknowledged that a high court's complete acceptance of a breach of its standing interpretations could be caused by the influence of other (national) actors. The high court's decision might be affected, e.g., by a national political develop-

ment or by a change of national law that a court uses as foundation for its reasons. In such a case, a European judgement might be a 'trigger' for the change in the national court's standing principles, but the change would have to be ascribed to national actors.

Finally, a reason for a court's complete compliance with the ECJ could be the absence of a margin to shirk, which would cause a *forced compliance* (see *Table 1* and example 1). This would mean that the ECJ has either full knowledge and control of the high court's implementation of its judgement, avoiding shirking through a strict monitoring regime, or would imply an *ex ante* prohibition of shirking on the side of the ECJ which can be accomplished by a very precise wording of judgements to make any shirking risky for the agents. Should the ECJ develop a very detailed solution for a very specific situation, this solution might be applicable only to a limited number of equally specific cases and leaves it to the courts to find circumstances differentiating a pending case so as not to fall under the ECJ's definition (Clark, 2016). However, in this given number of undoubtedly identifiable cases, the high court will have no opportunity to disregard the ECJ's decision without expressing open non-compliance. Thus, at least in some cases, the high court will not be able to find a loop-hole to continue its standing interpretation.

Speaking in terms of cost and benefit, (forced) compliance can be defined as quite 'pricey': the high court will have to break with its standing interpretation to full extent. On the positive side, an acceptance of ECJ decisions will guarantee legal certainty in the EU as well as in the national hierarchy, as subnational courts will not be forced to decide which 'superior' to follow. This way, the high courts will add to the development of the ideal of a 'law-governed' union and conform to the principle of openness towards European law.

On the brim of forms of non-compliance, *critical compliance* (see *Table 1*) can be seen as a third type of compliance differing in its aspects of benefit. This ideal type of strategy shall be defined as a (full) implementation of the ECJ's principles of interpretation by the courts of the member states accompanied by express criticism. This criticism can take different forms and its intensity will vary with the chosen medium. As a first alternative, criticism can be aimed at the outcome of the ECJ's decision. Possible mediums can be a high court's judgement itself when it, e.g., includes dissenting votes of individual judges. Although it must be taken into account that a critical opinion of single judges does not automatically imply the whole court's desire to shirk, it is a sign for the controversy of an issue. Aside from dissenting votes, the high court as a whole can express criticism as general statements in the judgement as well. Other – in practice less relevant – ways of voicing criticism can furthermore be professional journals or media statements.

A second form of criticism can be directed at the legal basis the ECJ uses as groundwork for its arguments (see example 2). As a result, the high court will still have to change its overall course regarding the outcome of a decision, but it will do so 'on its own terms', drawing on national legislation rather than following the ECJ in its expansive interpretation of European Union law (Alter, 2001, p. 37). This way, the high court emphasises the relevance of national law and its own standing and is able to symbolically 'defy' the ECJ in one aspect of its judgment without having to fear immediate reproof. Furthermore, this strategy does not entail the risk of losing the compliance of subnational courts, as the high court's action does not affect the outcome of future decisions. Therefore, when expressing criticism, high courts will have to cope with the same costs as in the cases of voluntary or forced compliance but will reap the benefit of distinguishing themselves as independent and authoritative actors.

Nearing the other end of the metaphorical spectrum, high courts can consider forms of non-compliance, choosing namely to *avoid* or *refuse* to accept a breach of their standing interpretation. Both strategies essentially differ from the reaction strategies described above regarding their outcome: instead of having to abandon their standing interpretation, high courts will find ways to continue deciding cases as before, effectively ignoring the official breach of their authority as best they can. As already mentioned in parts while displaying the forms of compliance, this strategy involves a rather high risk of being confronted with different kinds of costs (see *Table 1*). These include the risk of losing authority over lower courts, rendering non-compliance mostly pointless. Furthermore, ignoring the ECJ's decisions could endanger legal certainty in the national context, as addressees might not be able to estimate if and at what point high courts will be forced to comply. It will also counteract the aim of legal uniformity across the whole of the EU.

However, whereas these costs should be difficult to avert in the case of refusal and open non-compliance (Dani, 2017, p. 211), the action of avoidance can try to minimise these risks while still reaching the same outcome in the form of retaining practical authority (see example 3). When applying the strategy of avoidance, courts will ostensibly accept the ECJ's interpretation and refer to it in their future judgements, but will not employ it in practice (Vanberg, 2001; Clark, 2016). Instead, they will find legitimate ways to dismiss the applicability of the ECJ's interpretations for the case in question without openly expressing criticism or modify the interpretation according to their needs and preferences (Martinsen, 2015). This might not shield high courts from 'detection' indefinitely, but will enable them to continue their course of interpretation up to the point of being seen as refusing. *Table 1* gives an overview of the discussed theoretical strategies, their costs and benefits.

Table 1: Strategies of National High Courts

Category	Alternatives	Action	Costs	Benefits
Compliance	*Voluntary*	Complete implementation of ECJ's verdict	Abandoning standing interpretation	Securing legal certainty and uniformity of EU law
	Forced	Complete implementation of ECJ's verdict	Abandoning standing interpretation	Securing legal certainty and uniformity of EU law
	Critical	Implementation of ECJ's verdict accompanied by explicit criticism; choosing national legal basis	(largely) abandoning standing interpretation	Initiating open debate, stressing the importance of national law
Non-Compliance	*Avoidance*	Alleged acceptance, no practical implementation	Endangering legal certainty; risking non-compliance of subordinate courts	'quasi-refusal' with lesser risk, continuing standing interpretation
	Refusal	Open non-compliance	Endangering legal certainty; risking non-compliance of subordinate courts; violation of the principle of openness towards European Union law; risking reproof by ECJ	Continuing standing interpretation

Source: Own illustration.

4 Fighting for Authority: The Example of the German Federal Labour Court

The following paragraphs will present three cases illustrating practical examples of forced compliance, critical compliance and avoidance as a form of non-compliance. For this illustration, the article draws on judgements by the German Federal Labour Court (*Bundesarbeitsgericht (BAG)*) reacting to a breach of its standing interpretation by the ECJ deciding on a preliminary reference brought forward by a lower labour court. While the argumentation in this article must be restricted to this single court and can at this point not be generalised, it can serve as a theoretical starting point for continuative empirical work.

There are several reasons for the chosen examples. Generally, specialised courts (instead of a 'general' court such as the constitutional court which adjudicates on cases in different legal fields) are the actors establishing precise principles over a long period of time, while the referral to another court is the exception. The focus on a single legal field and a single court to illustrate ideal types of strategies eliminates a bias of specificities of a legal field as best as possible. Furthermore, influences of the characteristics of national legal systems can be avoided. The judgements eligible are restricted to a predefined time frame (2005-2011) so as to minimise influences such as major change in the collegiate of judges or extensive legal and policy reforms. The decision in favour of the BAG is motivated by the distribution of competences between member states and the EU in the field of labour law which makes this area especially prone to conflict (Ketelhut, 2010): matters of labour law lie only partly in the responsibility of the EU and the jurisdiction of the ECJ as codified in Art. 153 TFEU referring to protecting the health, safety and interests of workers. All other decisions are still to be made by the member states, creating a strongly intertwined distribution of authority and an ongoing process of possible shifts in this distribution.

The three cases used as examples here are selected on the basis of the (im-)precision of the relevant ECJ judgement as independent variable. The judgements range from closed/definite (example 1) to half-open/leaving room for own interpretation (example 2) to open/indefinite (example 3).

4.1 Example 1: 'Forced Compliance'

As example for the strategy of forced compliance, the article draws on the *Junk* case instituted at the *Arbeitsgericht Berlin* (Berlin Local Labour Court, ArbG) in April 2003. In a reference for a preliminary ruling, the Berlin court asked for a decision on how to interpret the term 'collective redundancies' according to Art. 1 to 4 of the Council Directive 98/59/EC. In the directive, the Council states that, in the case of upcoming redundancies, the employer has to inform the "workers' representatives in good time" of these plans so that the employer and the workers' representatives can try to find ways of "mitigating the consequences" of the redundancies for the employees "by recourse to accompanying social measures" (ECJ, C-188/03, recital 3). Therefore, it is important for the employees and their representatives to know how to define the exact point in time that constitutes the redundancy to be able to determine the "good time" for negotiating "accompanying social measures". In the case under considera-

tion, the parties proposed two alternatives: the moment of the redundancy was either to be the moment "of the expression by the employer of his intention to put an end to the contract of employment" or the moment of "the actual cessation of the employment relationship" (ibid., recital 31). The latter was the interpretation so far implemented by the BAG.

In general, the ECJ is inclined to decide in favour of employees as is in accordance with the protective rights laid down in the European Treaties (Ketelhut, 2010). It was therefore not surprising that it opted for the former alternative, which would give workers' representatives a longer "good time" to negotiate mitigating measures before the contracts of the employees factually end. In light of the need for a uniform interpretation of European Union law in all member states,

> "[t]he answer (…) must therefore be that Articles 2 to 4 of the directive must be construed as meaning that the event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment" (ECJ, C-188/03, recital 39).

The *Junk* case reached the BAG in March 2007. The BAG followed the ECJ's interpretation, but explicitly states that "the standing interpretation of the BAG, the prevailing opinion in professional literature as well as administrative practice" disagrees with the ECJ's interpretation (BAG, 6 AZR 499/05, recital 15). It even refers to a similar case it adjudicated on shortly after the ECJ's *Junk* decision in which the BAG decidedly denied the new definition of the "event constituting redundancy". However, now the BAG did not have the possibility to stick to its established definition. The term 'redundancy' was now clearly defined by the ECJ, leaving no room for interpretation. Considering its effort to keep its standing interpretation in place even after the ECJ had already answered the ArbG's question in the *Junk* case, this scenario can be categorised as a *forced compliance*.

4.2 Example 2: 'Critical Compliance'

As an example for a critical compliance, the article draws on the 2009 case of Gerhard Schultz-Hoff. The argument under consideration ensued regarding the compatibility or coincidence of sick leave and annual leave. Because of a "serious disability", the employee Schultz-Hoff had been put on "continuous sick leave until (…) his employment relationship ended" (ECJ, C-350/06, recital 11). Therefore, he was not able to take the paid annual leave he had been entitled to. He now sought compensation for this expired annual leave.

The *Landesarbeitsgericht Düsseldorf* (Regional Labour Court) directed a reference for a preliminary ruling at the ECJ inquiring "whether (…) a worker absent on sick leave for the whole or part of the leave year (…) is entitled to an allowance in lieu of paid annual leave not taken" (ibid., recital 2). So far, the BAG had judged any remaining annual leave to expire should the employment contract be terminated, unhindered by the reasons for which an employee did not take their annual leave. In such a situation, the (former) employee is also not entitled to a financial recompense for expired days of annual leave. The ECJ contradicted this interpretation, stating that

> "[w]ith regard to the right to paid annual leave (…), it is for the Member States to lay down (…) conditions for the exercise and implementation of that right, by prescribing the specific circum-

> stances in which workers may exercise the right, without making the very existence of that right (…) subject to any preconditions whatsoever" (ibid., recital 28).

With this judgement, the ECJ prohibited the BAG from implementing its standing interpretation, but explicitly acknowledged the member states' right in regulating annual and sick leave. It didn't make clear what kind of national preconditions are acceptable to restrict employees in being recompensed for expired annual leave.

Shortly after the ECJ's *Schultz-Hoff* judgement, the BAG had to adjudicate on a very similar case: here, an employee had suffered from a stroke making her unfit for work. When her employment contract ended, she sought compensation for 27 days of paid annual leave (BAG, 9 AZR 983/07, recital 18). Due to the analogousness of the cases, the BAG had no options regarding maintaining its standing interpretations, but had to follow the ECJ's *Schultz-Hoff* judgement. However, the BAG found a way to criticise the ECJ's judgement and to retain part of its own interpretation. The BAG determined the European legal basis on which the ECJ built its argument to be insufficient. Instead, the BAG used national law to re-evaluate the question of the expiration of paid annual leave. While the BAG did have to adjust its standing interpretation, it denied the ECJ's basis for its argument. This case, therefore, is an example of *critical compliance*.

4.3 Example 3: 'Avoidance'

In 2007, Dietmar Klarenberg brought forward an action concerning the wrongful termination of his employment contract and disputed the definition of "legal transfer of a part of a business to another undertaking" (ECJ, C-466/07). He had presumed that the part of business encompassing his position had been transferred to its parent company prior to his previous employer's insolvency. Should this be the case, his employment should have continued in a new company regardless of his former employer going out of business.

So far, the BAG had acknowledged a legal transfer of a part of a business if this part continued to operate "substantially unchanged and with its identity retained (…). By contrast, a part of the business cannot be regarded as transferred where it is fully integrated into the other undertaking's organisational structure or where its functions are carried out in a significantly larger organisational structure" (ibid., recital 21). In the case of Klarenberg, said parent company had a significantly larger structure and employees were integrated into different units carrying out their functions in a new framework. In line with the BAG, Klarenberg's position was therefore not legally transferred to a different company.

Following a reference for a preliminary ruling, the ECJ emphasised that the relevant EU Directive 2001/23 aimed to protect the rights of employees and stated that "an alteration in the organisational structure of the entity transferred is not such as to prevent the application of Directive 2001/23" (ibid., recital 44). Instead, it must be enough for an entity to retain "a functional link of interdependence, and complementarity, between [its] elements" (ibid., recital 47) to assert a legal transfer. The ECJ left the definition of the 'functional link' rather open to interpretation:

> "The retention of such a functional link between the various elements transferred allows the transferee to use them, even if they are integrated, after the transfer, in a new and different organisational structure, to pursue an identical or analogous economic activity" (ibid., recital 48).

Consequently, the ECJ found that in the *Klarenberg* case, a 'functional link' was retained and Klarenberg's position was legally transferred to a different company, which the lower court that had brought forward the reference for a preliminary ruling confirmed.

The BAG adjudicated on the *Klarenberg* case in 2011 (BAG, 8 AZR 329/09). It cited the ECJ's judgement and discussed the 'functional link' between elements as a significant criterion for confirming a legal transfer of a part of a business, but it still reached a different conclusion than the ECJ and the referring lower court. The BAG stated, that a part of a business can only then be legally transferred, if a clearly definable part had existed before the pursued transfer. In the present case, Klarenberg's 'department' had not existed as a clear and independent unit in the first place. Therefore, it could not have been transferred either way and it became irrelevant whether a sufficient 'functional link' between elements of the business part remained after a supposed transfer. In a following judgement in 2012, the BAG formulates this two-step assessment as a general principle (BAG, 8 AZR 730/09, recital 21). This action can therefore be seen as a strategy of *avoidance*.

5 Conclusion

The article set out with identifying courts as strategic actors with the intent to preserve their own authority. In the European Union, national high courts have to cope with a considerable loss of authority as the ECJ claims superiority in all matters touching on EU law and at the same time opens up contingencies for lower courts to question their national 'superiors'. Presuming a principal-agent relationship in the EU judicial system, it is assumed that national high courts aim to develop strategies to preserve their authority as best they can by shirking the ECJ's orders. The margin of shirking opportunities can be determined by the level of (im-)precision of the ECJ's judgements, providing for loopholes when using a general, unclear wording. The article developed five ideal types of reaction strategies for courts: *voluntary*, *forced* and *critical compliance* on the side of acceptance, and *avoidance* and *refusal* as nuances of non-compliance. The analysis of three cases adjudicated on by the German Federal Labour Court between 2005 and 2011 served as examples illustrating strategies of forced compliance, critical compliance and avoidance. In these cases, the chosen strategy corresponded to the degree of vagueness in the respective ECJ's answers to a preliminary reference.

While the inferred strategies can serve to determine a court's (immediate) actions, this model has to be extended in order to accommodate time as an additional factor. The courts' decision for a given strategy is based on an internal calculation of costs and benefits considering the risk of being found out to 'shirk' by other actors including, but not limited to, the ECJ. It could be assumed that the risk of being detected to shirk increases with each new decision. Consequently, the presented research offers opportunities for expansion and an embedment in a wider strategic and (game) theoretical framework (Vanberg, 2001).

It must be kept in mind that the strategies developed here are ideal types which allow for a categorisation of actions, but not necessarily for a fixed and unalterable definition. Therefore, every decision on a categorisation of a court's strategy must be based on a thorough case study considering the individual circumstances and research must be open to the discovery of new types of strategy. Apart from that, the abstract model of possible strategies and their preconditions must not be restricted to labour law or strictly to the EU context, but can be transferred to other (legal) contexts as well. As such, it overcomes an important short-coming of extant research on judicial actors: it does not focus on a specific – and therefore restricted – kind of courts or actors, e.g. constitutional courts, which have been the focus of research on a number of occasions. Instead, it is a starting point for a holistic approach to the study of courts' strategic actions.

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